

and HSN are utterly false and am writing to you to clarify the record.

This theme was repeated in another letter to Chairman Dingell, this one dated July 20, 1992, from Sharon McPhail, President of the National Bar Association:

These minority broadcasters provide their communities with programs that are produced locally and programs that address issues of interest to their minority audience: they are providing vital training and employment opportunities for minorities in the broadcast field.

Depriving home shopping stations of the right to mandatory carriage thus would thwart Congress' often-expressed goal of increasing minority station ownership. These minority-owned stations' public service programming serves the public interest^{56/} and they should not be penalized simply because they carry entertainment programming of a home shopping nature.

**There is Significant Viewing of
the SKC Stations**

Section 4(g) requires the Commission to consider the viewing of home shopping stations in determining whether they are serving the public interest, convenience and necessity. Preliminarily, it should be noted that the Commission has never held that the popularity of particular programming is proportional or in any way materially related

^{56/} SKC understands that some or all of these stations will submit comments elaborating on their public service to their communities.

to its public service value. To the contrary, the Commission has consistently refused to make value judgments concerning the public interest merits of particular program content, and, it has refused to attach public interest significance to the relative popularity or "good" nature of particular programs.^{57/}

In its Notice, the Commission recognizes that "[w]e have never before used a station's ratings as a factor to determine whether the licensee has met its public interest obligations." Notice, 8 FCC Rcd at 661. Conventional ratings do not and cannot accurately measure a program's audience, much less its public interest "value."^{58/} The industry thus has recognized the lack of ratings' importance as a measure of programs' merit or popularity.^{59/} Ratings thus should not be used to measure stations' audiences for purposes of this proceeding. Instead, the Commission should acknowledge the fact of the

^{57/} See, e.g., WGBH Educ. Found., 69 FCC 2d 1250 (1978); Television Wisconsin, Inc., 58 FCC 2d 1232 (1975), recon. denied, 59 FCC 2d 1236 (1976).

^{58/} Television's history is replete with examples of programs or series which enjoyed much critical acclaim but low ratings.

^{59/} This is particularly the case with respect to home shopping programming where the number of purchasers (roughly measured by Home Shopping Club membership) provides a better measure of popularity. Barry Diller, former chairman of Fox, Inc., characterizes the number of purchasers as "...the ultimate Nielsen rating." "Barry Diller's Search for the Future," The New Yorker, Feb. 22, 1993, at 49, 60.

home shopping format's existence and its growth over the past six years as an over-the-air broadcast network service as evidence of the substantial audience which home shopping stations enjoy.

The Commission recognized in its Television Deregulation decision that the marketplace acts to regulate the survival of popular, accepted formats and the demise of formats which do not attract sufficiently large audiences. The home shopping format has established itself as a viable popular format, as clearly evidenced by its growth over the last seven years. Not only do the SKC Stations carry HSC programming, the same network programming is carried on a full- or part-time basis by 24 other television stations, and different HSN network programming is carried on a full- or part-time basis by approximately 70 other television stations. Additionally, approximately 43 low power television stations carry HSN programming.^{60/}

In short, there is clearly a widespread popular demand for home shopping programming. This growth reflects factors such as the service home shopping provides to consumers who are handicapped or shut in and cannot readily go to stores to do their shopping and to those who do not have time or simply do not like to shop, as well as a high degree of general public satisfaction with HSN and its

^{60/} See Comments of Home Shopping Network, Inc.

products. This growth also reflects widespread viewing of home shopping stations.

The SKC Station Attachments include specific information concerning Home Shopping Club membership within each SKC Station's service area and demonstrate that such membership represents a substantial proportion of each market's television households. In particular, from 7% to over 15% of the television households in the SKC Stations' markets are HSC members and thus necessarily view those stations' programs. This represents a substantial number of television households -- a total of approximately 27,526,600 households in the 11 markets served by the SKC Stations.

HSC membership is generally a function of making a purchase. HSN's experience is that a far larger number of viewers simply watch station programming than make purchases.^{61/} Accordingly, the SKC Stations' actual audience is clearly far larger than indicated by membership figures alone.^{62/}

Even if audiences are assumed to be limited to those who actually make purchases, however, the SKC

^{61/} Many more viewers in effect "window shop" than make actual purchases.

^{62/} That the SKC Stations' ratings measured by ratings services may be below those of more conventional stations thus does not establish that they are unwatched or unpopular. The steady growth of the home shopping format demonstrates that the contrary is true.

Stations' television household market shares clearly represent a substantial audience. Denying this large audience continued access to the SKC Stations' uniquely local public service programming through denial of their entitlement to mandatory carriage would clearly be inconsistent with the Congressionally-declared public interest in ensuring the continuation of and access of viewers to locally originated programming. 1992 Cable Act § 2(a)(10)-(11).

In sum, any public interest determination which turns on a particular program format's popularity or ratings is suspect from both a constitutional and a policy standpoint. Assuming that these decisional objections could be overcome, however, and even assuming that program

with HSN. There have been proposals for other uses of frequencies assigned to some SKC stations, but those proposals affect all stations using the channels in question, not simply the SKC Stations. Moreover, such proposals have been and should continue to be considered in rulemaking proceedings of general applicability. Any determination that the 12 specific channels now allocated for the SKC Stations' use should be reallocated would be a content-based regulation which is clearly inconsistent with the constitution.^{63/}

It should be noted that far from reflecting competing demands for the channels in question, HSN's acquisition of what are now the SKC owned and operated stations generally represented the only proposed use of the frequency. When HSN acquired them in the 1980's, most of the SKC stations were in or facing bankruptcy, had been dark for substantial periods of time or had not been constructed due to financial difficulties. HSN's use of the stations' channels was thus not one of several competing demands for spectrum, it was the only demand for the spectrum. Absent

^{63/} Such action would be impermissible governmental regulation which is "...intended to curtail expression -- either directly by banning speech because of a harm thought to stem from its communicative or persuasive effect on its intended audience...or indirectly by favoring certain classes of speakers over others..." Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.), cert denied, 434 U.S. 829 (1977).

HSN, many if not all of the channels would eventually have gone dark, representing an enormous waste of spectrum resources.

License Renewal Processes. The Notice asks whether the Commission's existing license renewal processes adequately accommodate competing demands for the broadcasting spectrum. Notice, 8 FCC Rcd at 661. This is clearly the case, particularly insofar as demands for specific channels occupied by particular SKC Stations are concerned.^{64/}

As the Notice recognizes, every five years, television stations' past performance is subject not only to regulatory scrutiny, but is also open to challenge by any qualified entity which seeks to use the channel in question. The statute requires the Commission to consider competing spectrum demands in deciding which of competing applicants is to be awarded a license. Specifically, Section 307 of the Communications Act requires Commission licensing

^{64/} It should be noted in this regard that notwithstanding HSN's (and now SKC's) success in developing and optimizing spectrum utilization, there continue to be no competing spectrum demands. Although the Commission's procedures explicitly provide for competing applications, only one such application has been filed with respect to any HSN or SKC Station license renewal application and that application was dismissed prior to hearing. (On May 1, 1989, Arthur Liu filed a competing application with respect to WHSE-TV's 1989 license renewal application [File No. BPCT-890501KI]. That application was dismissed by Order. MM Docket No. 90-642.

decisions to consider "the fair, efficient, and equitable distribution of radio service." 47 U.S.C. § 307(b). In other words, all Commission licensing decisions must, by statute, consider competing spectrum demands.

There can be no more specific indicator of a competing demand for the specific spectrum used by a particular station than a renewal overfiling. Clearly, the existing, Congressionally-mandated license renewal scheme adequately takes into account competing demands for spectrum used by particular stations. The lack of such demand is established by the lack of overfilings, and should there be competing demands for the spectrum, established renewal procedures are more than adequate to address them.

Constitutional Considerations. To the extent Section 4(g) suggests that competing spectrum demands should be considered only with respect to home shopping stations, such action would clearly be unconstitutional. Spectrum allocation has never been based upon specific program content, and for good reason: it cannot be squared with the First Amendment. Any system of television channel assignments which would displace stations from allocated spectrum based solely on program content would be a prohibited restriction which curtails protected expression. The Commission cannot constitutionally decide there are competing demands for particular television channels simply

because of the content of programming presented over those channels.^{65/}

Use of Rulemaking. To the extent the Commission decides to consider competing uses for channels occupied by the SKC Stations, the Constitution thus clearly requires that any such consideration must affect all stations using those particular channels without reference to their programming. Moreover, such consideration must come in a rulemaking of general applicability.

There are already two pending proceedings which propose reallocation of the broadcast spectrum for non-broadcast services. The Commission's Advanced Television proceeding proposes a major shift of UHF frequencies to allow for conversion to ATV,^{66/} and the Commission still has before it a 1985 proposal for further sharing of the UHF band with land mobile services.^{67/} Any decision in those proceedings would of necessity affect other stations which also use frequencies assigned to the SKC Stations, and those

^{65/} Should the Commission decide to reallocate spectrum occupied only by stations having home shopping formats, serious Ashbacker concerns would also be raised, as the stations would have to have a forum in which to defend their past and proposed use of broadcast spectrum.

^{66/} See Second Further Notice of Proposed Rulemaking, MM

proceedings afford the proper vehicle for any reallocation which might occur. By contrast, a content-based determination affecting only a single group of stations cannot be reconciled with law or Commission policy.

**The SKC Stations Provide Competition
to Cable Home Shopping Services**

The final mandatory consideration in this proceeding is the extent to which broadcast home shopping stations provide competition with cable home shopping services. The answer to this inquiry is self-evident: the SKC Stations and other broadcasters affiliated with HSN provide the principal viable alternative to the other nationwide home shopping service, QVC. Denial of a fair opportunity for cable carriage of the SKC Stations inevitably would mean that those home shoppers who are cable subscribers and who desire to view and interact with home shopping video services must rely primarily on the services of a single company.^{68/} Such denial would also deprive cable subscribers of access to the SKC Stations' unique local public service programming, contrary to the fundamental intent of the 1992 Cable Act.^{69/}

^{68/} HSN also provides a cable home shopping service which is different in content from that provided to broadcast stations and which does not include provision for local public interest programming.

^{69/} 1992 Cable Act § 2(a)(9).

In making its determination under this factor, the Commission must bear in mind the difference between cable and over-the-air home shopping services. While broadcast stations which choose a home shopping format must comply with local public service obligations, cable home shopping services are not obligated to comply with any local public interest requirements. Accordingly, home shopping broadcast stations, unlike cable program services of any kind, have the same claim to entitlement to mandatory carriage as conventionally-formatted stations.

The SKC Stations are not asking for a competitive advantage in seeking mandatory carriage rights: they are simply asking to be treated on the same basis as and judged by the same standards as traditionally-formatted broadcast television stations. Their rights to cable carriage are thus predicated on the fact that they provide local public service contemplated by Section 307 of the Communications Act,^{70/} as well as on the obvious fact that cable carriage

^{70/} Must-carry rights provide numerous broadcast stations having traditional entertainment and specialty formats with "favored status" vis a vis their cable network competitors. That is precisely the point of must-carry: to provide mandatory carriage of qualified local broadcast stations, as distinguished from cable program services, because only the former have local public service obligations. As Chairman Quello has stated, "...the overriding crucial public interest factor is the preservation and enhancement of free local television service to all the public." Chairman James H. Quello, Speech at a Seminar sponsored by Prentice Hall Law & Business and Fordham University School of Law (Feb. 18, 1993).

of the SKC Stations and other over-the-air broadcast stations affiliated with HSN afford the most substantial competition for cable home shopping services. Section 4(g)'s third mandatory consideration clearly supports must-carry entitlement for the SKC Stations.

A Denial of Mandatory Carriage Rights to Stations With Home Shopping Programming Would Be Unconstitutional

Given the overwhelming record evidence of SKC's extensive public interest programming, much of it locally produced, the only conclusion the Commission can reach on the merits under the well-established public interest standard is that the SKC Stations are operating in the public interest, convenience and necessity and, therefore, are entitled to must-carry status pursuant to section 4(g). As discussed in detail in the Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc. and incorporated fully by reference herein, serious constitutional considerations also preclude the Commission from reaching any other conclusion:

(1) At the outset, this entire proceeding is constitutionally sensitive because it subjects one class of broadcasters, those offering a home shopping format, to additional burdens not imposed on any other class of broadcasters based solely on the content of programming they offer. To the extent that section 4(g) is grounded in a belief by some members of Congress that home shopping

formats do not serve the public interest, it comes dangerously close to constituting an unconstitutional Bill of Attainder.

(2) The public interest inquiry historically and properly has been an individualized inquiry engaged in during the normal licensing cycle. To make a class-wide determination in this proceeding that certain broadcasters are no longer operating in the public interest by definition would be to discriminate against one class of broadcasters by engaging in precisely the sort of content-based distinctions that the Supreme Court consistently has denounced.

(3) To conclude that the SKC Stations are operating in the public interest for purposes of licensing

Court reaffirmed just last week in City of Cincinnati v. Discovery Network, Inc.,^{71/} if commercial and noncommercial speakers both contribute to the problem sought to be addressed by governmental regulation, the regulation cannot discriminate against the commercial speaker out of a perception that such speech is of "low value."^{72/} This would "attach more importance to the distinction between commercial and noncommercial speech than [the Supreme Court's] cases warrant and [would] seriously underestimate[] the value of commercial speech."^{73/} To be justified at all such discrimination must be based on a distinction between commercial and noncommercial speech that is related to a legitimate interest. Thus, assuming arguendo that home shopping format broadcasters are engaged in commercial speech, the Commission cannot discriminate against them for reasons bearing no relationship to the rationale for providing greater latitude to regulate them in the first instance. The Commission cannot single out home shopping format broadcasters for specially disadvantageous treatment when the harm that it seeks to prevent -- impingement on cable operators' editorial discretion -- is caused by both commercial and noncommercial speech alike and, in point of

^{71/} No. 91-1200, slip op. (U.S. March 24, 1993).

^{72/} Id. at 8.

^{73/} Id.

fact, in some markets excluding home shopping format broadcasters from must-carry eligibility will have the opposite effect; it will decrease cable operators' editorial discretion by giving them fewer local signals to choose from in satisfying their carriage obligations.

(5) Even if any disadvantageous regulation of the SKC Stations is properly analyzed under the commercial speech doctrine, it would fail to pass muster. To the extent that SKC has been singled out in a manner that implicates Bill of Attainder and Separation of Powers concerns, it is doubtful that the governmental interests asserted are constitutionally legitimate at all, let alone "substantial." Any disadvantageous treatment of SKC penalizes speech that is fully lawful, and not misleading or fraudulent, merely because of dislike for its content. Because the SKC Stations broadcast not just commercial speech but locally produced public interest programming that fully satisfies all of their obligations as public trustees, any denial of eligibility for must-carry status based on the content of their entertainment programming would fail the requirement that commercial regulation be narrowly tailored. Most fundamentally, denial of must-carry status to the SKC Stations based on the commercial content of their entertainment programming would dramatically underestimate both the constitutional protection for and public interest

in SKC's commercial programming. The free flow of commercial information is guaranteed by the First Amendment, and is of vital interest to local and national economies.

Conclusion

SKC submits that the determination in this proceeding must turn principally on whether broadcast television stations with home shopping entertainment formats are able to provide public service programming that complies with established standards for service in the public interest, convenience and necessity. The nature of a station's entertainment format should -- and must under the Constitution -- be irrelevant to this conclusion.

Review of the record submitted here establishes that even under the strictest standards, the SKC Stations are doing exactly what the authors of the Communications Act envisioned in 1934 when they established a nationwide system of privately owned over-the-air broadcasting stations based on the concept of local licensing and local service. By centering their public service programming on IYI, the SKC Stations have returned television to its roots in the local community. They provide a programming service that actively seeks out local problems and concerns and addresses them on a local basis by involving community leaders, informed experts and average citizens alike. Contrary to the assumptions underlying Section 4(g), the SKC Stations serve

their local communities in ways far more direct and productive than many other traditionally-formatted commercial television stations.

Indeed, if the SKC Stations' entertainment programming were the more conventional mix of game shows, violent drama shows, and sexually-explicit talk shows and entertainment, their performance would clearly be sufficient not only to establish operation consistent with the public interest, but also would be sufficient to merit a substantial renewal expectancy.^{74/} That conclusion should not -- and cannot constitutionally -- be altered merely because of the content of those stations' entertainment programming.^{75/} The fact is that the SKC Stations' public

^{74/} "An incumbent applicant may be entitled to a renewal expectancy if its performance during the preceding license term has been 'substantial' meaning 'sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.'...In deciding whether to award a renewal expectancy, the Commission focuses on non-entertainment programming broadcast by the station, including news, public affairs, and public service announcements." Monroe Communications Corp. v. FCC, 900 F.2d 351, 353 (D.C. Cir. 1990) [citations omitted]; see also, e.g., Radio Station WABZ, Inc., 90 FCC 2d 818 (1982), aff'd sub nom., Victor Broadcasting, Inc. v. FCC, 722 F.2d 756 (D.C. Cir. 1983).

^{75/} The Commission suggests that the public interest standard for mandatory carriage may be different for that necessary for a renewal expectancy. SKC respectfully suggests that the two must necessarily be the same as both ultimately turn on a station's public interest programming. If there is a difference, the renewal expectancy standard must necessarily be higher because it determines the entire right to operate, while a mandatory carriage standard only
(continued...)

service programming complies in every respect with every applicable Commission requirement. ^{76/} Consideration of the three factors specifically mentioned in Section 4(g) likewise supports grant of entitlement to mandatory carriage. The SKC Stations, as well as other stations which carry home shopping programming, are clearly attracting substantial audiences;^{77/} they are not subject to competing spectrum demands (which should in any event be subject to rulemaking proceedings); and they provide the principal competition to cable home shopping services.

The Commission must therefore conclude that the SKC Stations are serving the public interest, convenience

^{75/} (...continued)
affects cable carriage rights. In either event, however, it is clear that the SKC Stations' programming record is "sound, favorable and substantially above a level of mediocre service..."

^{76/} As Senator Reid stated in the debate on Section 4(g), "[T]he Home Shopping Network should be treated like any other broadcaster. They meet all the FCC criteria with regard to public service. They are a legitimate business; they provide a service people want, and they deserve to be treated fairly." 138 Cong. Rec. S573 (daily ed. Jan. 29, 1992).

^{77/} If this were not the case, the number of home shopping stations would be declining rather than increasing.

and necessity and therefore qualify as "local commercial television stations" for purposes of the 1992 Cable Act.

Respectfully submitted,

SILVER KING COMMUNICATIONS, INC.

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March 29, 1993

Silver King Communications, Inc.
Exhibit No. 1

SUMMARY OF "IN YOUR INTEREST" PROGRAMS
DECEMBER, 1986 - DECEMBER, 1990

SUMMARY OF 'IN YOUR INTEREST' PROGRAMS
DECEMBER, 1986 - DECEMBER, 1990

<u>Stations</u>	<u>Markets</u>	<u>Number of Issues</u>	<u>Total No. of Guests</u>	<u>Guests Who Are Govt. Officials</u>
WHSE-TV	Newark, NJ	1966	576	113
WHSI-TV	Smithtown, NY	748	644	72
WHSB-TV	Boston, MA	854	1528	269
WHSW-TV	Baltimore, MD	807	857	307
WHSP-TV	Philadelphia, PA	486	1611	279
WQHS-TV	Cleveland, OH	936	892	229
WEHS-TV	Chicago, IL	469	821	25
WYHS-TV	Miami, FL	531	356	41
WBHS-TV	Tampa, FL	751	700	35
KHSH-TV	Houston, TX	1122	813	93
KHSX-TV	Dallas, TX	516	786	14
KHSC-TV	Los Angeles, CA	1166	860	224
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TOTAL		10,352	10,444	1,701 (16% of Total)

Silver King Communications, Inc.
Exhibit No. 2

EMERGENCY INFORMATION UPDATES
TELEVISION STATION WHSE-TV

**EXPLOSION - WORLD TRADE CENTER
WHSE-TV, NEWARK, N.J.**

The Emergency Informational Updates ran as follows:

<u>Broadcast Time</u>	<u>Content</u>	<u>Duration</u>
3:20 PM - 3:25 PM	WHSE-TV Local	5:00
3:50 PM - 4:00 PM	WHSE-TV Local/WABC-TV	10:00
4:20 PM - 4:25 PM	WHSE-TV Local/WABC-TV	5:00
4:51 PM - 4:53 PM	WHSE-TV Local/WABC-TV	2:00
5:21 PM - 5:26 PM	WHSE-TV Local/WNBC-TV	5:00
5:52 PM - 5:54 PM	WHSE-TV Local/WNBC-TV	2:00
6:21 PM - 6:26 PM	WHSE-TV Local/WNBC-TV	5:00
7:21 PM - 7:26 PM	WHSE-TV Local/WNBC-TV	5:00
7:50 PM - 7:52 PM	WHSE-TV Local	2:00

Silver King Communications, Inc.
Exhibit No. 3

RETRANSMISSION CONSENT LETTER
AND NOTE OF THANKS FROM WABC-TV

February 26, 1993

Ms. Ella Connors
Vice President and
Station Manager
Silver King Broadcasting
of New Jersey, Inc.
390 West Market Street
Newark, New Jersey 07107

Re: Retransmission Consent

Dear Ms. Connors:

By this letter, Capital Cities, Inc., the licensee of Station WABC-TV, New York, New York, hereby gives its consent to Station WHSE-TV to rebroadcast any and all of its station-produced television newscasts, news stories and news segments commencing on February 26, 1993 and until WABC-TV informs Silver King Broadcasting of New Jersey, Inc. ("Silver King") that WABC-TV has returned to full operating power and resumed normal stations operations. Capital Cities, Inc. will indemnify and hold Silver King harmless against and from any and all claims, damages, liabilities, costs and expenses arising out of Silver King's rebroadcast of WABC-TV's programming pursuant to this grant of retransmission consent.

Sincerely,

Art Moore 3/1/93

Art Moore
Program Director
WABC-TV
New York, New York

Ella -

Many thanks for helping

But - It meant a lot to our viewers.

Art